

No. 02-50190

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Appellee

v.

JAVIER FERREIRA,

Defendant-Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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BRIEF FOR THE UNITED STATES  
AS APPELLEE

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**JURISDICTION**

This is an appeal from the final judgment entered by the district court in a federal criminal prosecution. The district court had jurisdiction under 18 U.S.C. 3231. The defendant, Javier Ferreira, was sentenced on March 11, 2002. (R. 94; ER 6.)<sup>1</sup> Ferreira timely filed a notice of appeal on March 11, 2002, (R. 96; ER 10), which is treated as filed on March 14, 2002, the day the district court entered the final judgment, (R. 95). This Court has jurisdiction under 28 U.S.C. 1291.

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<sup>1</sup> This brief uses the following abbreviations: “R.” for the record entries on the district court docket and “ER” for the Appellants’ Excerpts of Record.

## **ISSUE PRESENTED**

Whether there was sufficient evidence to support Ferreira's felony conviction under 18 U.S.C. 242 and 2(b) for causing a deprivation of civil rights under color of law resulting in bodily injury.

## **STATEMENT OF THE CASE**

Ferreira appeals from his conviction after a jury trial on one felony count of causing a deprivation of rights under color of law, in violation of 18 U.S.C. 242 and 2(b), and one felony count of making false statements, in violation of 18 U.S.C. 1001.<sup>2</sup>

Ferreira worked as a guard at the Seal Beach Detention Facility in Seal Beach, California. In the early morning hours of June 21, 2001, Ferreira was on duty while an extremely intoxicated arrestee was being held in the facility's detoxification cell. The arrestee was being very loud and disruptive. Ferreira caused another inmate to deprive the victim of his rights, by entering the detox cell and punching the victim several times to make him be quiet; the beating caused injuries to the victims's head, eyes, and mouth. Ferreira later made false material statements about the incident to an FBI special agent.

On August 29, 2001, a grand jury in the Central District of California returned a two count indictment charging Ferreira with one felony count of violating 18 U.S.C. 242 and 2(b) for causing a deprivation of civil rights under

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<sup>2</sup> Ferreira does not challenge the sufficiency of the evidence supporting his conviction for making false statements under 18 U.S.C. 1001.

color of law resulting in bodily injury. (R. 1.) The indictment also charged another guard, James Smith, with violating 18 U.S.C. 3 (accessory after the fact) for his role in attempting to conceal the civil rights violation. On November 29, 2001, the grand jury returned a superseding indictment again charging Smith as an accessory after the fact, and again charging Ferreira with causing a deprivation of rights. In addition, it charged Ferreira with violating 18 U.S.C. 1001 for making false statements to an FBI agent. (R. 33; ER 1.)

The case was tried to a jury beginning on December 4, 2001, and on December 11, 2001, the jury returned a not-guilty verdict as to Smith, and a guilty verdict on each count against Ferreira. (See R. 74.<sup>3</sup>) On March 11, 2002, the district court sentenced Ferreira to 51 months imprisonment (R. 94; ER 6), and Ferreira timely appealed (R. 96; ER 10).

### **STATEMENT OF FACTS**

Javier Ferreira was employed as a guard at the detention facility in Seal Beach, California, which is located in Orange County. Ferreira was employed by a corporation called Contractual Services, Inc. (CSI), which had contracted with the City of Seal Beach to run its detention facility. (See Trial Tr., 12/4/01 A.M., at 91.) The detention facility is located in the basement of the two-story building that also houses the Seal Beach Police Department. (*Id.* at 92.) The Police Department has only 27 sworn officers. (*Id.* at 109.) As part of his administrative

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<sup>3</sup> The district court's docket entry incorrectly states that the jury returned a verdict of guilty against Smith.

responsibilities, a captain with the Seal Beach Police Department oversees the jail facility, and he acts as liaison to CSI, which actually manages the jail. (*Id.* at 90-91.)

Persons who are arrested and will be charged are brought to the detention facility and processed, then transported to the Orange County jail. (Trial Tr., 12/4/01 A.M., at 93.) The Seal Beach jail houses inmates who have been sentenced and have made arrangements to pay for their housing to avoid incarceration at the Orange County jail; these are referred to as pay-for-stay inmates. (*Id.* at 93.) It also houses inmates participating in a work furlough program, which allows them to leave the detention facility during the day to go to work, then return to the facility in the evening. (*Id.* at 94.)

The Seal Beach detention facility also has a detoxification cell, which is used to hold persons arrested for public intoxication long enough for the person to become sober. For the most part, public intoxication is not prosecuted in Orange County, (Trial Tr., 12/4/01 A.M., at 95), but persons who are found in public extremely intoxicated and are unable to care for themselves will be arrested and held in the detox cell until they become sober enough to be released, (*id.* at 96). The Seal Beach Police Department has delegated to CSI and its employees the responsibility of determining when the intoxicated person is sober enough to be released. (See *id.* at 102-103.)

There are 16 cameras throughout the detention facility. (Trial Tr., 12/4/01 P.M., at 293.) All 16 cameras are connected to a device called a multiplexer,

which feeds the images to a video recorder. (*Ibid.*) Eight of those cameras are also connected to a second multiplexer, which feeds the images to a second video recorder. (*Ibid.*) The multiplexers and recording equipment, along with two monitors that display the video images, are located in the booking area of the jail. (*Id.* at 299-300.) The multiplexers impose a date/time stamp on the video images. (*Id.* at 307-308.)

At around 2:00 a.m. on June 21, 2001, Seal Beach Police Officer Kevin Vilensky was driving in a patrol car and received a radio dispatch regarding a citizen complaint that someone on the municipal beach was yelling and stating that someone was going to die. (Trial Tr., 12/5/01 A.M., at 24 & 44.) When Officer Vilensky arrived at the beach, he found a bedroll and other personal belongings and, about 20 yards from the bedroll, he found a man named Arrow Stowers laying face down in the sand. (*Id.* at 57-58.) Officer Vilensky determined that Stowers was so intoxicated that he was not able to care for himself, so Officer Vilensky arrested him for his own safety. (*Id.* at 22-23 & 56.)<sup>4</sup>

Officer Vilensky and Stowers arrived at the booking area of the jail at 2:36 a.m. (Trial Tr., 12/5/01 A.M., at 29.) Stowers was processed, and Officer Vilensky filled out a certificate of detention, which indicated that Stowers was being detained only because of his intoxication, not for further prosecution. (*Id.* at 33.) At 2:51 a.m., Ferreira and Officer Vilensky walked Stowers to the detox cell,

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<sup>4</sup> Another officer, Linda McDonald, also responded to the dispatch and she assisted Vilensky in arresting Stowers. (Trial Tr., 12/5/01 A.M., at 58.)



(*id.* at 40), and after Officer Vilensky retrieved his hand cuffs, he left the jail area, (*id.* at 39). When he later went to the locker room, he heard loud singing and banging coming from the detox cell. (*Id.* at 39-40.)

During the early morning hours on June 21, 2001, Corporal Kay Moulton was the watch commander on duty at the Seal Beach Police Department. (Trial Tr., 12/5/01 A.M., at 116.) Sometime between 3:15 and 3:30 a.m., she began an inspection of the building, which included going downstairs to the jail. (*Ibid.*) When Cpl. Moulton came down the elevator, she could hear loud singing and banging coming from the detox cell; she talked with Ferreira and Smith in the booking area and joked about the loud inmate. (*Id.* at 119.) While she was talking with Ferreira in the booking area, she was able to see Stowers in the detox cell on the monitor; he was singing and hitting the walls. (*Id.* at 121.) She also saw him walking in circles, which she did not consider to be uncommon behavior for a person in the detox cell. (*Id.* at 122.) She then noticed that Stowers had climbed onto the toilet in the detox cell and was standing on it. (*Ibid.*) Moulton, Ferreira, and Smith then went down to the detox cell — a distance of only 15 to 20 steps from the booking area — to direct Stowers not to stand on the toilet. (*Id.* at 123.) Ferreira opened the door and went into the detox cell, then told Stowers he could not stand on the toilet. (*Id.* at 125.) Although Stowers was not violent or physically aggressive toward Ferreira, Cpl. Moulton later described him as “mouthy” and “argumentative.” (*Ibid.*) Stowers told Ferreira something to the effect that Ferreira thought he was a “big man” because he was in uniform. (*Id.* at

126.) Stowers threatened to fight Ferreira, but because such threats were common for intoxicated persons in the detox cell, Cpl. Moulton did not consider it a serious threat. (Trial Tr., 12/5/01 P.M., at 29.) The videotapes taken that morning revealed that Ferreira, Smith, and Moulton went to the detox cell to talk to Stowers at 3:52 a.m. (Trial Tr., 12/5/01 A.M., at 128.) Ferreira, Smith, and Moulton then left the area of the detox cell together, and Moulton complimented Ferreira on his handling of the situation. (*Id.* at 131.)

Shortly after Cpl. Moulton left the jail area, Ferreira woke up an inmate named David Gill. Gill was serving a sentence for felony drunk-driving; he was part of the work furlough program, however, so he would leave the jail in the morning, go to work, and then return in the evening. (Trial Tr., 12/5/01 P.M., at 33-35). On the night of June 20, 2001, the jail was “locked down” at about 10:30 p.m. — meaning all the cell doors were locked — and Gill went to sleep thereafter. (*Id.* at 37.) Gill was in one of the cells furthest from the detox cell. (*Id.* at 42.) Because of the noise in the jail, Gill went to bed wearing ear plugs and was able to sleep through the noise Stowers was making. (*Id.* at 38.) Gill was normally awoken around 5:15 a.m., so he could leave for work by 5:40 a.m. (*Id.* at 62.) On that morning, Ferreira woke Gill up more than an hour early, around 4:00 a.m. Ferreira asked Gill if he could hear the person in the detox cell making the noise, and Gill responded that he was wearing ear plugs and was able to sleep. (*Id.* at 40.) Ferreira stated that he could hear him. (*Ibid.*)

Ferreira asked Gill if he would go into the detox cell and try to talk Stowers

into keeping the noise down; Ferreira told Gill that he would turn the cameras off. (*Id.* at 40-41.) Gill later testified that the request was strange and it bothered him that Ferreira was asking him to do it. (*Id.* at 41-42.)

Gill then went with Ferreira to the detox cell, which was 40 to 50 feet away, and Ferreira opened the door. (Trial Tr., 12/5/01 P.M., at 42.) Ferreira then yelled down the hallway to turn the cameras off. (*Id.* at 44.) Ferreira told Stowers that Gill was someone who lived in the jail and was being kept awake, then motioned for Gill to enter the detox cell. (*Id.* at 45.) The person who was in the cell next to the detox cell later testified that before Ferreira yelled for the cameras to be turned off, he told Stowers that there was nothing that he, Ferreira, could personally do to him because Ferreira was in uniform. (Trial Tr., 12/6/01 A.M., at 101.)

The videotape from that evening shows that Gill entered the detox cell at 4:18 a.m. (Trial Tr., 12/5/01 P.M., at 47.) Gill told Stowers that the noise was keeping him up and told him to be quiet, but Stowers refused. (*Id.* at 46-47.) Gill went back to the door to talk to Ferreira, which occurred at 4:19 a.m. (*Id.* at 49.) Gill told Ferreira that Stowers would not be quiet. Once again, Ferreira mentioned that the cameras were off. (*Id.* at 50-51.) Ferreira indicated to Gill that Gill should “make him” or “get him” to be quiet. Gill testified regarding this conversation as follows:

I had said to him [Stowers] wasn't going to be quiet, and he said back to me, “Well, just go ahead and do — you know, just make him be quiet or get him to be quiet.” Something along those lines, and reminded me a second time that the cameras are off.

(Trial Tr., 12/6/01 A.M., at 69.)

Gill testified that he understood what Ferreira was asking him to do was “go in and rough him up.” (Trial Tr., 12/5/01 P.M., at 51; see also *ibid.* (“and it was my impression that I was going back in to rough the guy up”).) Gill testified that if he had any doubt that Ferreira wanted Gill to “deck” Stowers, he would not have done it. (Trial Tr., 12/6/01 A.M., at 68.)

Gill reentered the detox cell and again asked Stowers if he would be quiet, and when Stowers replied he would not, Gill hit him in the face two or three times. Stowers fell back toward the center of the cell, and grabbed onto Gill’s shirt, then Gill hit him two more times. (Trial Tr., 12/5/01 P.M., at 52.) Stowers never tried to hit Gill. (*Ibid.*) Gill then walked out of the detox cell and Ferreira was standing outside. (*Id.* at 52-53.) Ferreira did not express disapproval of what Gill had done, and while walking him back to his cell merely stated “5:15 Gill” referring to the time Gill was normally awoken. (*Id.* at 53.) But Ferreira came again to awaken Gill a little before 5:00 a.m. and told Gill he would have to leave early. (*Id.* at 62.) Gill asked if he would get into trouble, and Ferreira assured him that he would not. (*Ibid.*) Gill appears on the videotape leaving the booking area at 5:16 a.m., (*id.* at 68), although the sign out form for work furlough inmates incorrectly indicates that Gill left at the usual time of 5:40 a.m., (*Id.* at 65).

Shortly after 5:00 a.m. that morning, Ferreira went upstairs to the police area of the facility and spoke about Stowers to the watch commander, Corporal Joseph Miller, who had just come on duty. (Trial Tr., 12/6/01 A.M., at 115.) Cpl.

Kay Moulton, the watch commander whose shift had just ended was still in the area. (See Trial Tr., 12/5/01 A.M., at 134.) Ferreira told Cpl. Miller that there was a person in the detox cell who was refusing to leave, that he was stating someone had beaten him up, but that he did not want any medical attention. (Trial Tr., 12/6/01 A.M., at 116.) Ferreira told Miller that the person had stood on the privacy wall or toilet in the detox cell and fallen off. (*Ibid.*) Ferreira also told Miller that Cpl. Moulton had already been down to the jail and that everything was all right. (*Id.* at 117.) Moulton told Miller that Stowers had only been in detox about three hours and because he appeared to be so intoxicated, he could probably be there another three hours. (Trial Tr., 12/5/01 A.M., at 135.) Cpl. Miller checked the time that Stowers had been brought in and saw that he had only been in detox for two or three hours, so he told Ferreira to keep Stowers four to six hours, which was the usual time that intoxicated persons were detained, and then to see what would happen. (Trial Tr., 12/6/01 A.M., at 117.)

At about 10 a.m. that morning, Tony Rond, CSI's manager of the jail, came up to the police area and told Cpl. Miller that the person in the detox cell was refusing to leave and wanted to talk to an attorney. (Trial Tr., 12/6/01 A.M., at 118 & 148.) Miller reported this to his supervisors, went down to the jail to investigate, and saw Stowers in the detox cell. (*Id.* at 118-119.) Miller saw that Stowers obviously had injuries, which appeared to have been received from being punched in the face rather than falling off a toilet, (*id.* at 119-120), and there was blood on Stowers's pants, (*id.* at 122). The blood on the cell floor and walls also

indicated to Miller that there had been a fight rather than someone falling off a toilet. (*Id.* at 121.) Stowers told Miller that he had been beaten up and that he wanted to see an attorney. (*Id.* at 124.) Stowers told Miller that he had been beaten up “by you guys,” so Miller thought that he was stating that he had been beaten by a jail guard or a police officer. (*Id.* at 124-125.)

After talking with Stowers, Miller reviewed one of the videotapes, which showed Ferreira opening the door to the detox cell and letting an inmate in. (Trial Tr., 12/6/01 A.M., at 126-127.) Miller then reported to his supervisors that Stowers had apparently been beaten up by a guard or another inmate. (*Id.* at 127-128.) Miller returned to the jail with Captain King and Sergeant Zanone, and they watched both videotapes. (*Id.* at 128.) They saw that the tape which showed the inside of the detox cell had a time lapse on it; that is, the date/time stamp jumped from 2:53 a.m. to 4:21 a.m. (See Trial Tr., 12/6/01 A.M., at 128; Trial Tr., 12/4/01 P.M., at 317.) Miller then secured the videotapes as evidence, and turned them over to the Seal Beach detectives, who then turned them over to the Orange County District Attorney’s office. (Trial Tr., 12/6/01 A.M., at 129.)

That afternoon, while the D.A.’s office was conducting its investigation, Grant Fry of the Orange County Sheriff’s Department identification bureau went to the Seal Beach jail, met with the D.A. investigators, and took photographs of Stowers’s injuries and the blood on the walls and floor of the jail and on Stowers’s clothes. (Trial Tr., 12/4/01 P.M., at 267-268.) The photographs showed bruising on Stowers’s forehead and both eyes, and a cut on the inside of his lower lip. (*Id.*

at 270-271 (discussing Exh. 51-56.) Fry took the photographs at 2:20 p.m. that afternoon. (*Id.* at 275.)

That evening when Smith and Ferreira returned to begin their shift, D.A. investigators interviewed them separately. Smith was interviewed just before 10 p.m. (Trial Tr., 12/6/01 P.M., at 8.) Smith initially falsely told the investigators that he had not seen any problems that night, (*id.* at 23), but when told that there was another videotape, Smith admitted that he saw an inmate go into the detox cell, and he admitted that he could see the other inmate punching Stowers, (*id.* at 32). Smith watched the incident from the monitor in the booking area, and Smith admitted that he did not see Stowers throw any punches at Gill. (*Id.* at 33.) Smith admitted deactivating the camera in the detox cell before the incident took place. (*Id.* at 34.) Smith also admitted that the tape from the detox cell was rewound and recorded over. (*Id.* at 57.)<sup>5</sup>

On August 28, 2001, after the FBI had begun an investigation of the beating of Stowers, Ferreira was interviewed, in the presence of his attorney, by an FBI special agent. (Trial Tr., 12/7/01 A.M., at 7 & 37.) Ferreira made false, material statements regarding the incident. He told the agent that at approximately 4:30 a.m. on June 21, he had seen, through one of the monitors in the booking area,

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<sup>5</sup> Smith's statement to the D.A. investigators, which was recorded and transcribed, substantially implicated Ferreira, but those incriminating portions of the statement were redacted before it was revealed to the jury, in compliance with *Bruton v. United States*, 391 U.S. 123 (1968). This description of Smith's statement reflects the redacted version of which the jury was aware.

Stowers for a second time standing on the toilet, that he tried to focus the camera only on the detox cell, and that the next thing he saw was Stowers lying on the floor. He also told the agent that he did not see Gill hit Stowers. (*Id.* at 12.)

### **SUMMARY OF ARGUMENT**

Sufficient evidence was presented to the jury to prove beyond a reasonable doubt that Ferreira specifically intended to cause a deprivation of Stowers's civil rights by causing Gill to use unreasonable force in an effort to quiet Stowers.

There is ample evidence to suggest that Ferreira intended Gill to use unreasonable force against Stowers. Ferreira directed that the cameras be turned off so that Gill's actions would not be recorded. After Gill requested Stowers to be quiet and he refused, Ferreira told Gill to make Stowers be quiet. Gill understood that at that point Ferreira wanted him to beat Stowers to make him be quiet. The video images taken during the beating show that Ferreira was watching the beating. Ferreira did not attempt to interfere with the beating, nor did he rebuke Gill afterwards. Moreover, Ferreira wanted Gill to do what he, as a law enforcement officer, could not do – use unreasonable force. The evidence supports the conclusion that the force Ferreira specifically intended Gill to use was unreasonable force. Stowers was a nuisance to Ferreira because he was singing and banging loudly. Ferreira's response was to have Gill beat him. Thus, the jury was clearly reasonable in inferring from these circumstances that Ferreira intended Gill to use unreasonable force against Stowers.



## STANDARD OF REVIEW

Whether sufficient evidence supports Ferreira's conviction is a question of law that this court reviews *de novo*. *United States v. Diaz-Cardenas*, 351 F.3d 404, 407 (9th Cir. 2003). "There is sufficient evidence to support a conviction if viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Ibid*.

## ARGUMENT

### SUFFICIENT EVIDENCE SUPPORTS FERREIRA'S CONVICTION FOR CAUSING A DEPRIVATION OF RIGHTS UNDER COLOR OF LAW

Ferreira was convicted of causing a violation of 18 U.S.C. 242. Under 18 U.S.C. 2(b)

[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Section 242, in relevant part, prohibits, "under color of any law, \* \* \* willfully subject[ing] any person \* \* \* to the deprivation of any rights \* \* \* secured or protected by the Constitution or laws of the United States." The three essential elements of all Section 242 offenses are thus that the defendant (1) willfully (2) under color of law (3) deprived the victims of federal rights. See *United States v. Lanier*, 520 U.S. 259, 264 (1997).<sup>6</sup> The willfulness element makes Section 242 a

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<sup>6</sup> A violation of Section 242 is a felony "if bodily injury results." 18 U.S.C. (continued...)

specific-intent crime: The defendant must have specifically intended that the deprivation of rights occur. *United States v. Reese*, 2 F.3d 870, 880-881 (9th Cir. 1993), cert. denied, 510 U.S. 1094 (1994). The requisite intent is the “intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.” *Id.* at 881 (quoting *Screws v. United States*, 325 U.S. 91, 104 (1945)).

Ferreira was charged with causing Stowers to be deprived of his right to be free from unreasonable force, which is guaranteed by the Fourth Amendment and is incorporated against state actors by the Due Process Clause of the Fourteenth Amendment. See Superceding Indictment Count I (R. 33; ER 1); see also *Lolli v. County of Orange*, 351 F.3d 410, 415 (9th Cir. 2003) (“Fourth Amendment sets the applicable constitutional limitations for considering claims of excessive force during pretrial detention.”) (alteration and internal quotation marks omitted). In general, determining whether a use of force is “unreasonable” under the Fourth Amendment “requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing

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<sup>6</sup>(...continued)

242. In this case, the government proved that the violation resulted in bodily injury. Ferreira does not dispute on appeal that, although he was employed by a private corporation, he was acting “under color of law.” Even if he had, however, such an argument would fail because while Ferreira was acting as a guard at the Seal Beach jail he was clearly exercising authority on behalf of Seal Beach and was, therefore, a state actor. See *Rosborough v. Management & Training Corp.*, 350 F.3d 459, 460-461 (5th Cir. 2003) (*per curiam*) (in suit under 42 U.S.C. 1983, court held that private prison management corporation and its guard employees were acting under color of law).

government interest at stake.” *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks omitted).

Ferreira does not contend on appeal that the beating Gill delivered to Stowers — punching him in the face several times and leaving him on the floor bleeding — was an application of “reasonable force.” Nor could he, as this use of force was clearly unreasonable under the circumstances. See, e.g., *Vinyard v. Wilson*, 311 F.3d 1340, 1349 (11th Cir. 2002) (force plainly unreasonable where in response to slightly intoxicated arrestee’s screaming and using foul language in back of patrol car, officer stopped patrol car, grabbed handcuffed arrestee hard enough to bruise her, and then used pepper spray on her); *Jones v. Buchanan*, 325 F.3d 520, 530 (4th Cir. 2003) (“mere use of foul language, even a drunk’s loud use of such language in a police station, does not justify an objectively reasonable police officer knocking the drunk down, jumping on him, and breaking his nose” because the drunk’s behavior is a “nuisance” not a threat) (citing *Vinyard*).

On appeal, Ferreira contends only that there was insufficient evidence to prove beyond a reasonable doubt that he specifically intended Gill to deliver the unreasonable force. Ferreira argues that the evidence did not show that Ferreira intended Gill to use any force, much less that Ferreira intended Gill to use unreasonable force. See Appellant’s Br. at 14.

There was ample evidence before the jury upon which it could conclude that Ferreira intended Gill to use unreasonable force to make Stowers be quiet. Ferreira asked Stowers more than once to be quiet and he refused. Ferreira then

awakened Gill and asked him to go into the detox cell and try to convince Stowers to be quiet. Significantly, in this initial conversation, Ferreira told Gill that he would turn the cameras off.

Ferreira opened the door to the detox cell, and told Stowers that there was nothing he could personally do about the noise “because of his uniform,” but that Gill was a person who lived in the jail and was being kept awake. Ferreira then shouted for Smith to turn off the cameras and directed Gill to enter the detox cell. Gill tried unsuccessfully to talk Stowers into being quiet. When he reported this to Ferreira, Ferreira reminded Gill that the cameras were turned off and told him to make Stowers be quiet. From what Ferreira told Gill, Gill understood that Ferreira was asking him to “rough [Stowers] up.” Gill then went back into the detox cell and beat Stowers. On the videotape recording, the image from the camera in the hall outside the detox cell during this beating, Ferreira can be seen looking into the cell. Ferreira did not attempt to stop Gill or rebuke him after the beating.

There was ample evidence upon which the jury could have inferred that Ferreira wanted Gill to beat Stowers rather than merely asking him to be quiet. The clearest indication of Ferreira’s intent on this point is that Gill in fact tried to reason with Stowers and failed; when he reported that failure to Ferreira, Ferreira sent Gill back into the detox cell to make Stowers be quiet. The jury certainly could have drawn the inference from this evidence that Ferreira intended Gill to use unreasonable force because talking had failed. This is further supported by Ferreira’s comment to Stowers that there was nothing Ferreira could do about

Stowers's noise because Ferreira was in uniform. If asking Stowers to be quiet was all that he had intended Gill to do, his comment regarding his being in uniform makes no sense.

Also, Gill understood Ferreira to want him to rough Stowers up, and he testified that if he had any doubt that Ferreira had wanted him to hit Stowers, he would not have done so. (Trial Tr., 12/5/01 P.M., at 51; Trial Tr., 12/6/01 A.M., at 68.)<sup>7</sup> Although Ferreira on appeal downplays the significance of this testimony, the jury was certainly entitled to consider Gill's understanding of what Ferreira was asking him to do. The correctness of Gill's understanding of Ferreira's intent is bolstered by Ferreira's failure to stop the beating or rebuke Gill afterwards.

Ferreira disputes the value of this evidence by arguing that there was no evidence that Ferreira was able to see Gill while he was beating Stowers. Appellant's Br. at 16. Actually, there was substantial evidence upon which the jury could have concluded that Ferreira was fully aware of what was going on in the detox cell. The jury was able to see the video recording of the view outside the detox cell, including while Ferreira stood outside the cell while Gill beat Stowers. The video shows Ferreira looking into the cell. (See Trial Tr., 12/6/01 A.M., at 126-127 & 160-161 & 166; Ex. 20-24 (stills taken from video); Ex. 2 (video); Ex. 2-C (excerpts of video).) Thus, contrary to Ferreira's argument, the jury was fully

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<sup>7</sup> On appeal, Ferreira attacks Gill's credibility, but "the credibility of witnesses is a question for the jury unreviewable on appeal." *United States v. Yossunthorn*, 167 F.3d 1267, 1270 (9th Cir. 1999).

able to judge what Ferreira might have seen.

As to the argument that the evidence does not demonstrate that Ferreira specifically intended Gill to use unreasonable force, the jury had ample evidence from which to conclude that he did. First, that Ferreira intended that Gill use unreasonable force if necessary to make Stowers be quiet can be inferred from his forming the scheme to have the cameras turned off. He informed Gill of this scheme as soon as he woke Gill up and initially enlisted his assistance. Moreover, he reminded Gill of it when he sent him back into the detox cell to make Stowers be quiet. Thus, the jury was clearly reasonable in inferring that Ferreira intended Gill to use unreasonable force against Stowers.

Second, even had Stowers done something to justify Ferreira, a law enforcement officer, to use force against him, there was no legitimate law enforcement purpose served in having Gill — an inmate rather than a law enforcement officer — use force against Stowers. Finally, as detailed above, the evidence showed that Ferreira had intended for Gill to “rough up” Stowers to make him be quiet. Ferreira had the cameras turned off and reminded Gill of that before sending Gill back into Stowers’ cell. Ferreira watched as Gill beat Stowers and neither stopped nor rebuked him. By indicating that he was sending Gill to do what he, as a law enforcement officer, could not do, Ferreira made clear that what he intended was the use of unreasonable force.

The use of force employed in the current case was clearly unreasonable in these circumstances. Stowers was not, for example, refusing to cooperate with

legitimate efforts to move him or keep him from hurting himself. Regarding when Ferreira, Smith, and Moulton went to the detox cell to tell Stowers not to stand on the toilet, although Stowers was “mouthy” and “argumentative” to Ferreira, there is no evidence that Stowers posed a threat or that or that anything more than de minimis force would have been needed to keep him off the toilet. (See Trial Tr., 12/5/01 A.M., at 125.) Indeed, Ferreira does not contest that the actual force employed was unreasonable. The only thing that Ferreira contests is that there was insufficient evidence that he intended such force be used. For the reasons stated above, the jury was clearly entitled to conclude that Ferreira specifically intended Gill to use unreasonable force.

**CONCLUSION**

Because ample evidence supports Ferreira's conviction under 18 U.S.C. 242 and 2(b), this Court should affirm.

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## **STATEMENT OF RELATED CASES**

In accord with Ninth Circuit Rule 28-2.6, counsel for the United States states that he is not aware of any cases related to this appeal.

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**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C)  
AND CIRCUIT RULE 32-1 FOR CASE NO. 02-50190**

I certify that the attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with Fed. R. App. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

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## **CERTIFICATE OF SERVICE**

I certify that on February 24, 2004, two copies of the foregoing Brief of the United States as Appellee were served by First Class mail on

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